Abdul Aziz bin Ismail v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–150 OF 2011
APANDI ALI, LINTON ALBERT AND HAMID SULTAN JJCA
24 SEPTEMBER 2013

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Criminal Procedure — Conviction — Grounds for reversing conviction — Whether errors in findings of fact and misdirection by trial judge raised reasonable doubts on prosecution case — Whether conviction of accused unsafe

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The appellant was found guilty and sentenced to death by the High Court for trafficking in 2,696g cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). In his instant appeal against conviction and sentence, the appellant claimed he should be acquitted as the trial judge had (i) made wrong findings of fact from the available evidence (ii) failed to properly evaluate the evidence in concluding that a prima facie case had been proved, and (iii) failed to make a finding whether he had rebutted the presumption of trafficking under s 37(da) of the DDA, and, in that context, failed to consider and apply '*Radhi*'s directive'. According to the prosecution's evidence, the appellant was arrested by police officers after they had observed him carrying a bag which was found to contain the cannabis.

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Held, allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the appellant:

(1) The trial judge failed to undertake a maximum evaluation of the evidence at the end of the prosecution case before making a finding that a prima facie case had been established. This was contrary to the mandated provisions of s 180 of the Criminal Procedure Code (see para 5(a)).

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(2) The trial judge also failed to address the challenges made by the defence during cross-examination of the prosecution witnesses, namely, as to the version that the drugs were placed at the scene by a person named Bidin. The judge had made findings of fact that were perverse or contrary to available evidence such as the finding that Bidin did not exist and was a figment of the appellant's imagination even though the prosecution's witness had testified that Bidin was arrested on the same day as the appellant (see paras 5(a) and (b)).

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(3) The judgment did not show deliberation or consideration by the trial judge as to whether the appellant had rebutted the presumption of trafficking under s 37(da) of the DDA which was invoked against him. This non-direction was contrary to the accepted practice known as

Radhi's directive. The proper direction was for the trial court to have considered whether on balance of probabilities the appellant had rebutted the presumption of trafficking. This was a separate exercise by itself (see para 5(c)).

(4) In view of the various errors in the findings of fact and the fatal misdirection by the trial judge, there were reasonable doubts in the prosecution case and the conviction was unsafe (see paras 6–8).

[Bahasa Malaysia summary

Perayu didapati bersalah dan dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana mengedar dadah kanabis sebanyak 2,696g, kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Dalam rayuannya terhadap sabitan dan hukuman, perayu mendakwa dia sepatutnya dilepaskan memandangkan hakim perbicaraan telah (i) membuat dapatan fakta yang salah daripada keterangan yang sedia ada (ii) gagal untuk menilai dengan betul keterangan tersebut dalam memutuskan bahawa kes prima facie telah dibuktikan, dan (iii) gagal untuk membuat dapatan sama ada dia telah mematahkan anggapan pengedaran di bawah s 37(da) ADB, dan, dalam konteks ini, gagal untuk mempertimbangkan dan mengguna pakai '*Radhi*'s directive'. Mengikut keterangan pihak pendakwaan, perayu ditangkap oleh pegawai polis selepas mereka memerhati dia membawa beg yang didapati mengandungi kanabis.

Diputuskan, membenarkan rayuan, mengetepikan sabitan dan hukuman dan melepaskan serta membebaskan perayu:

(1) Hakim perbicaraan gagal untuk mengambil kira penilaian maksimum terhadap keterangan pada akhir kes pihak pendakwaan sebelum membuat dapatan bahawa kes prima facie telah dibuktikan. Ini adalah bertentangan kepada peruntukan yang dimandatkan oleh s 180 Kanun Tatacara Jenayah (lihat perenggan 5(a)).

(2) Hakim perbicaraan juga gagal untuk menilai cabaran-cabaran yang dibuat oleh pembelaan semasa pemeriksaan balas saksi-saksi pihak pendakwaan, iaitu, terhadap versi bahawa dadah telah diletakkan di tempat kejadian oleh seorang yang bernama Bidin. Hakim telah membuat dapatan fakta yang bercanggah atau bertentangan terhadap keterangan sedia ada seperti dapatan bahawa Bidin tidak wujud dan adalah khayalan perayu walaupun saksi pihak pendakwaan telah memberi keterangan bahawa Bidin ditangkap pada hari yang sama seperti perayu (lihat perenggan 5(a) & (b)).

(3) Penghakiman tidak menunjukkan pertimbangan oleh hakim perbicaraan terhadap sama ada perayu telah mematahkan anggapan pengedaran di bawah s 37(da) ADB yang dibangkitkan terhadapnya. Salah arah ini adalah bertentangan kepada arahan yang diguna pakai

yang dikenali sebagai '*Radhi*'s directive'. Arahan betul adalah untuk mahkamah perbicaraan mempertimbangkan sama ada atas imbangan kebarangkalian perayu telah mematahkan anggapan pengedaran. Ini adalah pertimbangan berasingan oleh mahkamah (lihat perenggan 5(c)).

(4) Mengambil kira pelbagai kesilapan dalam dapatan fakta dan salah arah serius oleh hakim perbicaraan, terdapat kesangsian yang munasabah dalam kes pihak pendakwaan dan sabitan adalah tidak selamat (lihat perenggan 6–8).]

Notes

For cases on grounds for reversing conviction, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1855–1857.

Cases referred to

Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 1 CLJ (Rep) 311, SC (refd)

Nagappan a/l Kupusamy v PP [1988] 2 MLJ 53, SC (refd)

Legislation referred to

Criminal Procedure Code s 180

Dangerous Drugs Act 1952 ss 37(da), 39B(1)(a)

Appeal from: Criminal Trial No 45–75 of 2009 (High Court, Kuala Lumpur)

Ameenuddin bin Mohamed Ibrahim (Ameen Harbhajan & Co) for the applellant.
Farah Ezlin Yusof Khan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Apandi Ali JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant was convicted and sentenced to death for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') by the Kuala Lumpur High Court. The charge, for which the appellant was convicted, reads as follows:

> Bahawa kamu pada 19 Ogos 2009 jam lebih kurang 3.10 petang, di hadapan Klinik lbu Mengandung dan Kanak-Kanak, Jalan Hang Tuah, dalam Daerah Dang Wangi, Wilayah Persekutuan Kuala Lumpur telah mengedar dadah berbahaya iaitu Cannabis sejumlah berat 2696 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] The appellant appealed against his conviction and sentence. On appeal,

we allowed the appeal and set aside the conviction and sentence. We now give our reasons.

FACTS OF THE CASE

[3] For ease of reference, we shall reproduce the facts as appeared in the respondent's written submission:

> On 19 August 2009 at 2.30pm, Insp Mohd Normal Hisyam bin Malkan @ Molkan (SP5) went to Klinik Ibu Mengandung dan Kanak-Kanak at Jalan Hang Tuah, Kuala Lumpur.
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> SP5 together with D/L/Corp Hairuddin bin Mishoon (SP2) was in a car stationary at the gate (marked 'Z' position as per exhibit P6D) about 15 meters from the clinic. They observed for 20 minutes.
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> According to SP2 and SP5, they saw the appellant leaving the security guard's post and walked towards the back area of the clinic. After a few minutes, both then saw the appellant walking out from the back of the clinic carrying a white bag in his hand.
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> Quickly, SP5 instructed SP2 and L/Corp. Nasry (another policeman who was in the same car with them) to arrest the appellant. As they approached SP5 introduced himself as 'Police' and took the white 'Lacoste' paper bag from him and handcuffed the appellant.
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> According to SP5, the appellant looked 'takut dan menggelabah' and as he was handcuffing the appellant, he was struggling ('meronta-ronta').
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> SP5 then inspect the contents of the white 'Lacoste' paper bag, witnessed by SP2 and the appellant, found inside 3 slabs of ganja. He then seized the items and brought the appellant to the police station where he then hand over to the Investigating Officer, Insp Prakphat a/l Tim (SP6).
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> The chemist, Puan Mainmoonah binti Sulaiman (SP3) analysed the seized substance and testified that it contains cannabis weighing 2696 gram.

CONTENTIONS BY THE APPELLANT

[4] Learned counsel for the appellant canvassed the following grounds in support of the appeal:

(a) improper evaluation of evidence when making a finding of prima facie case;

(b) learned trial judge made wrong findings of fact;

(c) learned trial judge did not make any finding as to whether the defence has rebutted the presumption of trafficking; and

(d) in relation to the above, the learned trial judge failed to adequately consider and apply the *Radhi*'s directive.

OUR FINDINGS AND CONCLUSION

[5] Upon perusal of the records of appeal and after hearing the submissions of both parties, we hold that:

(a) There was no maximum evaluation of the evidence at the end of the case for the prosecution by the learned trial judge before she made a finding of a prima facie case. This is contrary to the mandated provisions of s 180 of the Criminal Procedure Code. In her grounds of judgment (at p 84 of the appeal records) the learned trial judge merely stated as follows:

> The court found the evidence of the six witnesses to be consistent, credible and reliable. The court was satisfied that based on the evidence adduced by the 6 witnesses the prosecution had succeeded in proving on a prima facie basis the following ingredients on the offence of drug trafficking which the accused was charged with:

The learned judge failed to address the challenges made by the defence counsel during the cross-examinations of the prosecution witnesses, namely as to the version that the drugs were placed at the scene by a person named Bidin. Such failure is prominent when it was on record that SP5, Insp Mohd Normal Hisyam (at p 45 of the appeal records) testified, during cross-examination, as follows:

> Pada 19.8.2009 selepas Tertuduh ditangkap, Bidin ditangkap dan kedua-dua mereka dibawa ke IPK, Kuala Lumpur dan pada 20.8.2009 Bidin dihantar ke lokap di Bukit Jalil.

(b) That the learned trial judge had made a few findings of fact that are perverse or contrary to available evidence. These are findings by the learned trial judge in the course of considering the defence story. The perverse findings can be found at pp 100 and 101 of the appeal records. At p 100, the learned judge wrote: 'secondly, how could he be working as a security guard at the clinic when he could not even give the name of his employer?' We perused the notes of evidence, but we could find such evidence. On the contrary there is evidence to show that the appellant named two persons who were his supervisors, namely sister Fauziah and sister Zuraidah.

At p 101, the learned trial judge wrote: 'Fourthly, the court was satisfied that Bidin did not exist in real life and was a figment of the accused's imagination. It was also concocted and fabricated by the accused from the very beginning of the trial in order to evade criminal liability for the

cannabis which the police found on him. If what he had said about the existence of Bidin is true, the IO would have no problem in locating Bidin since he could give a good description of Bidin as well as the floor and the block of flats where Bidin resided.'

This finding is obviously contrary to the evidence of SP5, who testified that the character Bidin was arrested on the same day, ie on 19 August 2009 and both the appellant and the said Bidin were taken to IPK Kuala Lumpur and that on 20 August 2009 Bidin was sent to the Bukit Jalil lock-up (see p 95 of the appeal records, as stated earlier in para (a) above).

(c) From the grounds of judgment too, we could not find any deliberation or consideration as to whether the appellant had rebutted the presumption of trafficking under s 37(da) of the DDA, that was invoked against the appellant. There was no such finding.

This non-direction is contrary to the accepted practice known as the *Radhi*'s directive. The proper direction is for the court to consider whether on a balance of probabilities the appellant had rebutted the presumption of trafficking. This is a separate exercise by itself. To appreciate such a situation it is appropriate to refer to the case of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 at p 171; [1991] 1 CLJ (Rep) 311 at p 315, where the Supreme Court held as follows:

> In this connection, counsel for the appellant had referred to us the case of *PP v Saimin & Ors* [1971] 2 MLJ 16 where Sharma J held that the falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt. We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v PP* [1963] MLJ 263 go one step further before convicting the accused by giving due consideration as to why the defence story though could not be believed did not raise a reasonable doubt on the prosecution case. Thus, even though a judge does not accept or believe the accused explanation, the accused must not be convicted until the Court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case. To satisfy this test it is not so much the words used by the judge, but rather the actual application of the test to the facts of the case that matters. In this case, we found the learned trial judge offered practically no reason why the defence notwithstanding its falsity and unconvincing nature, had failed to cast reasonable doubt on the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.

[6] In the light of such fatal misdirection by the learned trial judge and coupled with findings that are contrary to available evidence, we are of the

considered opinion that there are reasonable doubts in the prosecution's case. In the upshot too, we are of the view that the conviction is not safe.

[7] It is also our judgment that it is trite law that an accused person in a criminal trial need not prove anything. The burden of proving the case beyond reasonable doubt is always on the prosecution. The Supreme Court in *Nagappan a/l Kupusamy v Public Prosecutor* [1988] 2 MLJ 53, at p 54 had succinctly stated as follows:

> Here we have to go back to first principles. In a criminal proceedings, the onus on the prosecution throughout is to prove beyond reasonable doubt. From the beginning to the end, the burden remains on the prosecution to prove the guilt of the accused. At the close of the whole case, the court has to consider all the evidence adduced by both the prosecution and the defence and has to be satisfied that the case has been proved beyond reasonable doubt.
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> In other words, at the close of the whole case, the court has to consider all the evidence before it whether they satisfy all the ingredients of the offence. If upon the whole evidence the court is left in a real state of doubt, the prosecution is said to have failed to satisfy the onus of proof which lies upon it.
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> How much evidence is to be adduced depends on the nature of the requirement. Where the burden is shifted to the defence by a statutory presumption, the test in *R v Carr Briant* and adopted in *Public Prosecutor v Yuvaraj* would be applied as applied in civil proceedings, namely, on the balance of probabilities.

[8] In view of the various errors in the findings of fact and the fatal misdirection by the learned trial judge, it is our judgment that there are merits in the appeal by the appellant. For the above reasons, we allow the appeal. The conviction and sentence by the High Court are set aside and in substitution thereto we order that the appellant be acquitted and discharged of the offence he was charged with.

Appeal allowed, conviction and sentence set aside and appellant acquitted and discharged.

Reported by Ashok Kumar